(2.)

No. 96-853

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

MUSTANG FUEL CORPORATION, ET AL.,

*Petitioners,*

v.

VIOLA HATCH, ET AL.,

*Respondents.*

WARD PETROLEUM CORPORATION,

*Petitioner,*

v.

JUANITA LEARNED, ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. As a general rule, unless Congress provides otherwise, are allotments of land held in trust by the federal government for members of a federally recognized Indian tribe "Indian country" over which the Tribe retains inherent taxing jurisdiction?

2. Did Congress, in creating trust allotments for members of the Cheyenne-Arapaho Tribe, pursuant to the Allotment and Cession Agreement of 1890, divest the Tribe of jurisdiction to tax activities on the allotments?

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## STATEMENT OF THE CASE

On April 27, 1988, the Cheyenne-Arapaho Tribes of Oklahoma (Tribe) enacted a tax on, *inter alia*, oil and natural gas produced, severed, saved, and removed from allotted lands held in trust for tribal members.[1] Pet. App. at 82, 106-113. The purpose of the tax is to "strengthen the tribal government" by "licensing and regulating certain conduct within the tribal jurisdiction," and "to provide financing for expenses of tribal government operations and services. . . . " Pet. App. at 83. Under tribal law, tax revenues must be used for essential governmental services such as tribal courts, law enforcement, roads, and education. Pet. App. at 83-84.

Petitioners conduct oil and gas development operations on lands of the Tribe and on trust allotments of

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[1] The Tribe is a federally recognized Indian tribe organized under a constitution adopted pursuant to the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §§ 501-509, and approved by the Secretary of the Department of the Interior in 1974.

members of the Tribe.[2] In October, 1988, Petitioners filed suit in federal district court for the Western District of Oklahoma to challenge the Tribe's authority to tax their activities on the trust allotments.[3] The Tribe moved to stay or dismiss, on the ground of failure to exhaust tribal remedies as required by *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). By subsequent agreement between the parties, the federal court action was stayed pending exhaustion of tribal remedies and the tax money at issue was escrowed with the federal court for the duration of the litigation. Pet. at 6, 24.

Petitioners first pursued administrative appeals before the Cheyenne-Arapaho Tax Commission. In June 1989 the Commission ruled that it lacked jurisdiction under tribal law to determine the validity of the law that it was charged with enforcing. That decision was final and the appeals were dismissed.

Petitioners then filed suit in the Cheyenne-Arapaho District Court. There the case was submitted on cross-motions for summary judgment on the issue of the Tribe's right under federal law to tax activities on trust allotments. In a written opinion, the Tribal Court granted summary judgment in favor of the Tribe. The Tribal Court concluded that the trust allotments "are now, and always

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[2] The State of Oklahoma also taxes Petitioners' activities on trust allotments. Pet. at 24 n.2. The State's jurisdiction to impose its taxes is not an issue in this case. And, the State's jurisdiction should not affect any determination of tribal jurisdiction here. This Court has upheld taxation of non-Indian activities within Indian country by both tribes and states. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (cigarette purchases); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (oil and gas severance).

[3] Petitioners do not challenge the Tribe's authority to tax their activities on tribal lands. Pet. at 5.

have been a part of the Cheyenne and Arapaho Indian reservation," that the trust allotments are " 'Indian Country' as the term is defined by federal law," and that the trust allotments are "subject to taxation by the tribal government." Pet. App. at 78.

Petitioners appealed to the Tribal Supreme Court, which, in a written opinion, affirmed the Tribe's right to tax Petitioners' activities on trust allotments. The Tribal Supreme Court held that trust allotments are Indian country and therefore that activities on the allotments are presumptively subject to inherent tribal jurisdiction. Pet. App. at 54. The Tribal Supreme Court also held that Congress has not divested the Tribe of its inherent authority to tax the activities of those who chose to do business on trust allotments. Pet. App. at 52.

Petitioners then moved to reopen the action in federal court. The parties again submitted cross-motions for summary judgment. The United States appeared by brief and at oral argument as *amicus curiae* in support of the Tribe's taxing authority. *See* Brief of United States as *Amicus Curiae* (W.D. Okla. filed Nov. 7, 1994). The district court granted the Tribe's summary judgment motion, holding that the Tribe has authority to tax activities on the allotments which have been continuously held in trust by the United States. Pet. App. at 32.

Petitioners appealed and again the United States appeared as *amicus curiae* in support of the Tribe. *See* Brief of United States as *Amicus Curiae* (10th Cir. filed Nov. 20, 1995). The Court of Appeals for the Tenth Circuit affirmed. The Court of Appeals held that as general rule, tribes have jurisdiction over activities on the trust allotments of their members because those lands are Indian country. Pet. App. at 6-7. The Court of Appeals also held that this Tribe was no exception because Congress had never divested the Tribe's inherent jurisdiction over

activities on the trust allotments within the original boundaries of the Tribe's reservation. Pet. App. at 9-10

All four courts that sustained the Tribe's right to tax Petitioners' activities on trust allotments relied on the following history. In 1865 the United States negotiated a treaty with the Tribe to set aside a reservation in what is now Oklahoma and Kansas. Treaty of Oct. 14, 1865, 14 Stat. 703. When it was ratified, Congress required that the treaty be amended to locate the reservation entirely within Oklahoma. 14 Stat. 708. Thus, in 1867 a second treaty was negotiated which defined a reservation wholly in Oklahoma. Treaty of October 28, 1867, 15 Stat. 593. However, the Tribe apparently misunderstood the location of the reservation specified in the 1867 treaty and never occupied it. To address this problem, in 1869, an Executive Order effectuated the 1865 treaty reservation provisions by establishing reservation boundaries coinciding with the territory the Tribe was actually occupying (1869 Reservation). Executive Order of August 10, 1869. *See* Charles J. Kappler, *Indian Affairs, Laws, and Treaties* 839-41; *see also Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665, 666 (10th Cir. 1980).

Pursuant to the General Allotment Act of 1887, 25 U.S.C. §§ 331-349, Congress authorized formation of the Jerome Commission to negotiate allotment and cession agreements with many of the tribes in Western Oklahoma, including the Cheyenne-Arapaho. *See* Act of March 2, 1889, Ch. 412, 25 Stat. 980. In 1890, the United States concluded an Allotment and Cession Agreement with the Tribe. The Agreement was ratified *verbatim* by Congress in the Act of March 3, 1891, 26 Stat. 989. *See* Pet. App. at 120. By the Agreement the Tribe ceded to the United States the lands mistakenly set aside by the 1867 treaty. Then, "subject to" the selection of trust allotments within the boundaries of the 1869 Reservation by individual

tribal members, the Tribe ceded the remaining unallotted portion of the 1869 Reservation.

After the members of the Tribe had selected their allotments, the unallotted lands of the 1869 Reservation were opened to non-Indian settlement in 1892 by Presidential Proclamation No. 23, 27 Stat. 1018. The allotments, however, continued to be held in trust for members of the Tribe. Their trust status remains today. *See* 25 C.F.R. Chap. 1., App. 748-752.

## INTRODUCTION

Petitioners seek review of the decision below sustaining the jurisdiction of the Tribe to impose an oil and gas severance tax on activities occurring on the trust allotments of tribal members. The decision addresses the two issues in this case.[4] The first issue is whether, as a general rule, trust allotments are Indian country over which tribes possess inherent sovereign powers, including the power to tax activities conducted within that territory. The second issue is whether any act of Congress excepts the Tribe here from this general rule. Because the Court of Appeals fully considered and correctly decided both the general issue and the specific issue in this case, there is no need for review by this Court.

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[4] Respondents have rephrased the questions presented to more accurately reflect the issues in this case. Respondents' Brief at i.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. THE COURT OF APPEALS CORRECTLY FOLLOWED THE GENERAL RULE AS SET FORTH BY CONGRESS AND CONSTRUED BY THIS COURT THAT TRUST ALLOTMENTS ARE INDIAN COUNTRY AND SUBJECT TO TRIBAL JURISDICTION

Petitioners concede that their activities on tribal lands are subject to tribal taxation. Pet. at 5; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (holding that a tribe may tax oil and gas severance activities on an Indian reservation). The general issue presented in this case is whether trust allotments of tribal members are also territory within which activities may be taxed by an Indian tribe.[5] As the Court of Appeals properly held, the starting point for answering this question is to determine whether the trust allotments are "Indian country." Pet. App. at 6. Indian country is the geographic territory over which federal and tribal jurisdiction generally extends and from which state jurisdiction is generally excluded. *See* Felix S. Cohen, *Handbook of Federal Indian Law*, 28, 29-31 (1982 ed.). Based on the definition of Indian country developed by this Court and codified by Congress, the Court of Appeals correctly concluded that trust allotments are Indian country.[6]

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[5] Petitioners "analogize" the issue in this case to a question of state jurisdiction over land which is clearly beyond the state's territorial jurisdiction. Pet. at 27. That analogy is flawed, because it merely begs the question at issue in this case, which is whether trust allotments are within a tribe's territorial jurisdiction.

[6] The issue is whether the trust allotments are "Indian country," not whether they are a "formal" Indian reservation. Because Indian country is broader than formal reservations, *see* 18 U.S.C. § 1151; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991), Respondents do

In *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993), this Court unanimously and unequivocally held that trust allotments are Indian country. In *Sac and Fox*, a tribe challenged a state's imposition of income and motor vehicle taxes on persons employed and on cars principally garaged within the tribe's territory. 508 U.S. at 120. In its challenge, the tribe relied primarily on the rule of Indian immunity from state taxing jurisdiction on Indian reservations as that rule was set forth in *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). *Id.* The state defended on the ground that the Indian immunity rule applied only to "formal" Indian reservations and therefore did not apply to the Sac and Fox Nation, whose territory consisted of parcels of tribal trust land and individual trust allotments. *Id.* at 118. The Court rejected the state's argument, stating:

> . . . our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.' Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. *See* 18 U.S.C. § 1151.

*Id.* at 123.

This holding makes clear that for purposes of jurisdiction in federal Indian law, trust allotments are the equivalent of formal reservations and other tribal lands.

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not argue and do not need to argue that the trust allotments are a reservation. *Cf.* Pet. at 23. For the same reason, Petitioners' characterization of the trust allotments as "land outside of a reservation," Pet. at 9, 24, misses the point. Land outside of a reservation may nevertheless be Indian country. 18 U.S.C. § 1151; *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

Hence, like formal reservations, the trust allotments of tribal members are territory over which tribal jurisdiction generally extends. *Accord DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 and 446 (1975) ("Indian allotments, the Indian titles to which have not been extinguished," remain subject to "exclusive tribal and federal jurisdiction").

The decision in *Sac and Fox* followed closely on the heels of another decision by this Court, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). The Court in *Potawatomi* likewise rejected an argument that tribal territory must be a formal Indian reservation in order for the jurisdictional rules of federal Indian law to apply. In *Potawatomi*, a state tried to sue a tribe to enforce tax assessments on activities that occurred on a parcel of tribal trust land. The state argued that the tribe's sovereign immunity was not a bar to suit because the activities did not occur on a "formally designated 'reservation,' but on land held in trust." 498 U.S. at 511. Rejecting that claim, *Potawatomi* affirmed that "[no] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that [the state] urges." *Id.* Rather, the Court held that:

> In *United States v. John*, 437 U.S. 634, 57 L.Ed.2d 489, 98 S.Ct. 2541 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government."

*Id.* Because the tribal trust land in *Potawatomi* was "validly set apart," sovereign immunity attached to bar the state's suit against the tribe.

As *Potawatomi* and *Sac and Fox* clarify, the reason that formal Indian reservations are indistinguishable from

tribal trust land parcels and trust allotments, is that these lands all meet the "validly set apart" test, this Court's principle test for determining whether particular territory is Indian country. The "validly set apart" test originated in the Court's earliest determinations of Indian country. In *Donnelly v. United States*, 228 U.S. 243 (1913), the Court held that "nothing can more appropriately be deemed 'Indian country' . . . than a tract of land that . . . is *lawfully set apart* as an Indian reservation." 228 U.S. at 269 (emphasis added). In *United States v. Pelican*, 232 U.S. 442 (1914), the Court held that when a validly set apart reservation is turned into trust allotments for individual tribal members – precisely the type of land at issue here – the trust allotments are likewise Indian country. *Pelican* stated:

> The lands, which, prior to the allotment, undoubtedly formed part of the Indian country, still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation. . . .
>
> In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain. The allottees were permitted to enjoy a more secure tenure, and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands, set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through

> the distribution into separate holdings, the government retaining control.

232 U.S. at 449 (citations omitted).

Other recent decisions of this Court confirm that trust allotments, like reservations and other tribal lands, are Indian country. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2217 n.2 (1995) (finding that state jurisdiction was excluded within Indian country, which included trust allotments). Indeed, in every case where it has had occasion to do so, the Court has steadfastly held that allotments are Indian country. *Chickasaw*, 115 S.Ct. at 2217; *Sac and Fox*, 508 U.S. at 123; *DeCoteau*, 420 U.S. at 427; *Pelican*, 232 U.S. at 449.[7]

The law of the State of Oklahoma also recognizes the general rule that trust allotments are Indian country. In *Ahboah v. Housing Auth. of the Kiowa Tribe of Indians*, the Supreme Court of Oklahoma stated that "the touchstone for allocating authority among the various governments has been the concept of 'Indian country,' a legal term delineating the territorial boundaries of federal, state and tribal jurisdiction." 660 P.2d 625, 627 (Okla. 1983), *cited with approval in Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1985). The court then stated that, "[i]ndividual trust allotments have long been recognized as Indian country. . . . " *Id.* at 628-29; *see also State ex rel.*

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[7] It is true, as Petitioners point out, Pet. at 26, that cases such as *Sac and Fox* and *Potawatomi* have addressed extensions of state jurisdiction into Indian country, rather than specifically addressing inherent tribal jurisdiction within Indian country. However, these cases are quite relevant to the present case. They are relevant because the rule of Indian immunity from state jurisdiction in Indian country is simply a corollary of the rule of tribal sovereignty. *McClanahan*, 411 U.S. at 168-171 (discussing "the Indian sovereignty doctrine, with its concomitant jurisdictional limitation on the reach of state law").

*May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 82 (Okla. 1985) ("a trust allotment is 'Indian country' "); *Lewis v. Sac and Fox Tribe of Oklahoma Housing Auth.*, 896 P.2d 503 (Okla. 1995) (Indian country includes Indian allotments).

In addition to judicial decisions holding that trust allotments are Indian country, since at least 1948, Congress has expressly included trust allotments within the definition of Indian country. The Indian country statute, 18 U.S.C. § 1151, provides in relevant part that Indian country includes:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) *all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.*

18 U.S.C. § 1151 (emphasis added). As explained in the Reviser's note, Section 1151(c) essentially codified this Court's 1914 decision in *Pelican*. *See* Reviser's note, 1948 Act, Title 18 U.S.C.A. at 86 (West 1986).[8]

Hence, when the Court of Appeals below held that as a general rule, "Indian tribes have jurisdiction over lands that are Indian country, and allotted lands constitute Indian country," Pet. App. at 7-8, it was following a long, unbroken line of this Court's controlling decisions and 18

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[8] This brief will discuss the Indian country statute's applicability to civil cases, *infra*, at Part III, Section A.

U.S.C. § 1151. There is thus no basis for review by this Court on this point.

## II. THE COURT OF APPEALS CORRECTLY DECIDED THE VERY NARROW QUESTION OF WHETHER CONGRESS HAS DIVESTED THIS TRIBE'S TAXING JURISDICTION OVER ACTIVITIES ON THE TRUST ALLOTMENTS OF TRIBAL MEMBERS

### A. The Cheyenne-Arapaho Allotment and Cession Agreement is Not Congressional Divestment of Tribal Taxing Jurisdiction Over Activities on the Trust Allotments

It is well established that among the fundamental powers of inherent tribal sovereignty is the power of taxation. "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty. . . . " *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980). Tribal taxation powers extend specifically to oil and gas severance activities of non-Indians within tribal territory. *Merrion*, 455 U.S. at 144; *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

Tribes retain their inherent powers "unless divested of [them] by federal law or necessary implication of their dependent status."[9] *Colville*, 447 U.S. at 152. This Court

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[9] Regarding inconsistence with dependent status, "[t]his Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when [1] the tribes seek to engage in foreign relations, [2] alienate their lands to non-Indians without federal consent, or [3] prosecute non-Indians in tribal courts which do not accord the full protections

has firmly upheld inherent tribal taxing authority absent explicit congressional divestment of that authority. In *Merrion*, oil and gas lessees argued that tribal authority to tax their activities on tribal land had been implicitly divested by the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, and other federal energy legislation and policy. 455 U.S. at 149-152. This Court rejected that argument because the statutes presented no 'clear indications' of congressional divestment. *Id.* at 152.

In *Kerr-McGee*, the issue was whether the Secretary of the Interior must review and pre-approve tribal taxes on business activities on tribal land. The mineral lessee there asserted that such approval was necessary under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g. 471 U.S. at 198-200. This Court, admonishing that courts must "tread lightly in the absence of clear indications of legislative intent," *Id.* at 200 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53 (1978)), rejected these assertions, finding no such requirement expressly in the statutes.

It is thus clear that unless Congress has expressly divested the Tribe here of its inherent power to tax the activities of Petitioners on trust allotments, that power remains intact. In this case, Petitioners rely solely on the Allotment and Cession Agreement ratified by the Act of

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of the Bill of Rights." *Colville* at 153-54; *accord South Dakota v. Bourland*, 508 U.S. 679, 699 (1993) (Souter, J., dissenting); *see also Duro v. Reina*, 495 U.S. 676 (1990) (tribes lack criminal jurisdiction over Indians who are members of another tribe); *Rice v. Rehner*, 463 U.S. 713, 726 (1983) (liquor regulation). However, the Court in *Colville* held that there is "no overriding federal interest that would necessarily be frustrated by tribal taxation." 447 U.S. at 154.

March 3, 1891, 26 Stat. 989 (1891 Act), for their argument of congressional divestment.

Article I of the 1891 Act addresses the disposition of land which had been designated to the Tribe by treaty in 1865, as amended by treaty in 1867, but which the Tribe had never occupied. Under the terms of Article I, the Tribe unconditionally ceded all of this land. *See* Pet. at 3. This point is not in dispute. Rather, Petitioners hinge their divestment argument on Articles II and III. Pet. at 19-21. These articles address the land which, pursuant to the 1865 treaty, was set aside by Executive Order in 1869 and actually occupied by the Tribe as a reservation (1869 Reservation).

Significantly, both Articles II and III are silent regarding the Tribe's sovereign powers, including the power to tax. Under a strict reading of this Court's cases, that should end the inquiry in favor of the Tribe. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence on this point is that the sovereign power to tax remains intact." *Merrion*, 455 U.S. at 148-49 n.14; *see also* Brief of United States as *Amicus Curiae* 10-14 (10th Cir. filed Nov. 20, 1995) (arguing that while the 1891 Act transferred a property interest in the allotments from the Tribe to tribal members, it did not affect the Tribe's sovereign jurisdiction over activities on the allotments).

Petitioners argue, however, that by Articles II and III, the Tribe unconditionally ceded the entire 1869 Reservation and thus lost jurisdiction over all of the 1869 Reservation lands, including lands allotted to and held in trust for tribal members. *See* Pet. at 17-21.[10] The Court of

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[10] If taken to its logical conclusion, Petitioners' theory calls into question the Tribe's jurisdiction even over activities of its

Appeals properly rejected this argument and held that "[t]he plain language of the Act indicates that while the allotted lands were selected from the lands ceded, the allotted lands *themselves* were not ceded." Pet. App. at 10 (emphasis in original).

The Court of Appeals aptly recognized that the telling language in the 1891 Act is in Article II. Article II provides in relevant part:

> *Subject to the allotment* of land in severalty to the individual members of the Cheyenne and Arapaho tribes of Indians, *as hereinafter provided for* and subject to the conditions hereinafter imposed, for the considerations hereinafter mentioned the said Cheyenne and Arapahoe Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character, in and to the lands embraced in [the 1869 reservation].

26 Stat. 989, 1022 (emphasis added).

The term "subject to allotment" modifies the cession language. It makes the cession of some lands expressly conditioned upon the allotment of others, and excludes the trust allotments from the ceded lands. Notably, this critical modifying language appears only in Article II and not in Article I. Thus, Article I is not "identical" to Article II as Petitioners assert. *See* Pet. at 19-20. Unlike Article I,

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tribal members on the trust allotments. This would be contrary to *DeCoteau* wherein this Court stated with respect to a similar Allotment and Cession Agreement that "Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities." 420 U.S. at 428; *accord Solem v. Bartlett*, 465 U.S. 463, 467 n. 8 (1984).

Article II is not an unconditional cession – it is a cession subject to allotment.

Other important language in Article II is the language indicating that allotments would be "hereinafter provided for." This language is important because Article III provides, in relevant part:

> Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article II hereof, *and in part consideration for the cession of lands named in the preceding article*, it is agreed by the United States that each member of the said Cheyenne and Arapaho tribes of Indians over the age of eighteen years shall have the right to select for himself or herself one hundred and sixty acres of land, to be held and owned in severalty. . . .

26 Stat. 989, 1023 (emphasis added). Petitioners argue that the "out of the land ceded" language in Article III operated to cede the allotments. Pet. at 16, 20-21. The Court of Appeals, however, correctly recognized that Article III is not a cession clause. *See* Pet. App. at 10; *see also Solem v. Bartlett*, 465 U.S. 463, 475 (1984) ("isolated phrases" outside the cession clauses are "hardly dispositive" evidence of congressional intent to cede tribal lands). Rather, the court held it is a clause "providing for" the details of the allotment process, such as identifying the land from which the allotments would be selected, the tribal members who would be entitled to select, and the size of the allotments. Pet. App. at 10. This construction of Article III properly harmonizes Article III with Article II.

The Court of Appeals rightly followed this Court's rule that, in interpreting statutes, courts must look to the statutory language and follow its plain meaning. *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain,

'the sole function of the courts is to enforce it according to its terms' "). Thus, the Court of Appeals' decision does not merit review by this Court on this point.

Indeed, the Court of Appeals' decision is in accord with *Ahboah v. Housing Auth. of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983), wherein the Oklahoma Supreme Court construed a virtually identical contemporaneous Allotment and Cession Agreement and rejected the precise argument made here by Petitioners. In *Ahboah*, a state housing authority argued that a tribe had "ceded" and therefore lost all jurisdiction over the trust allotments of its members. 660 P.2d at 627-28. The Allotment and Cession Agreement at issue in *Ahboah* stated:

> Subject to the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, . . . the said Comanche, Kiowa and Apache Indians hereby cede, convey, transfer, relinquish and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest of every kind and character, in and to the lands embraced [within the Comanche-Kiowa-Apache reservation].

*Id.* (citing the Act of June 6, 1900, 31 Stat. 676). The court rejected the housing authority's argument, however, finding no evidence of congressional intent in the Agreement of cession of trust allotments or divestment of tribal jurisdiction over them. *Id.* at 628. The court also found the argument "untenable as it ignores dispositive holdings of the United States Supreme Court," including *United States v. Pelican*. *Id.*

Moreover, although the Court of Appeals here found no occasion to look beyond the language of the 1891 Act, the Act's legislative history supports the decision below. *See Bryan v. Itasca County*, 426 U.S. 373, 381 (1976)

(reviewing legislative history for clear indications that act of Congress divested a tribe of its immunity from taxation). The legislative history clearly shows that the trust allotments were excluded from the ceded land and that the Tribe's jurisdiction over the allotments remains intact.

In a letter regarding the Tribe's Allotment and Cession Agreement, the Jerome Commission, which had been authorized to negotiate with the Western Oklahoma tribes, wrote to the Commissioner of Indian Affairs about the lands that had been retained for the Tribe through its members:

> In order that all claim of title in the Indians might be extinguished we have included in the contract a complete relinquishment of title in and to all the above tracts of country, *saving to the Indian allotments of land in severalty only*, in the reservation created by said Executive Order.

Letter from the Jerome Commissioners to the Commissioner of Indian Affairs (Nov. 13, 1890), *reprinted in* S. Exec. Doc. No. 1, 51st Cong., 2d Sess. 4 (1890) (emphasis added).

The Commissioner of Indian Affairs in turn wrote to the Secretary of the Interior. In describing the agreement between the United States and the Tribe, the commissioner was careful to point out that Article II contained very specific language regarding retaining allotments, whereas Article I did not. The commissioner summed up the agreement as follows:

> By the first article of the agreement the Cheyenne and Arapahoe tribes cede, convey, transfer, relinquish and surrender, forever and absolutely, all their claim, title, and interest of every kind and character in and to the reservation set apart for said Cheyenne and Arapahoe Indians, by the treaty of October 28, 1867 (15 Stats., 593).

> By the second article they cede, convey, transfer, relinquish, and surrender, forever and absolutely without any reservation or condition, express or implied, all their claims, title and interest of every kind and character in and to the land embraced in the reservation set apart for their use and occupation by the executive order of August 10, 1869, *subject to the allotment of land in severalty to the individual members* of the said Cheyenne and Arapahoe tribes of Indians, as provided in the agreement.

Letter from Acting Commissioner R.V. Belt to the Secretary of the Interior (Dec. 1, 1890), *reprinted in* S. Exec. Doc. No. 1, 51st Cong., 2d Sess. 2 (1890) (emphasis added).

Further evidence of intent to exclude trust allotments from the ceded lands can be found in the congressional debate over the 1891 Act. For example, in the Senate, Senator Dawes referred to "six several agreements made by commissioners appointed by the United States to treat with different tribes of Indians for a cession of *portions of their reservations*." 22 Cong. Rec. 3453 (1891) (emphasis added). Among these agreements was the Cheyenne-Arapaho Agreement. *Id.* at 3443.

Likewise, in the House, Representative Perkins explained that:

> [t]he Cheyenne and Arapaho Indians were occupying these lands under an Executive Order . . . [I]t is proposed by Congress to remove the Cheyennes and Arapahoes from *the most of these lands* and open them to settlement. . . . "

*Id.* at 3718 (emphasis added). Representative Peel stated that:

> the Shawnees [sic] and the Arapahoes have negotiated, as the chairman states, with a commission appointed by the President in pursuance of an act of Congress to negotiate with

> all the Indian tribes in the Indian Territory for any title or claim they may have to any *surplus* lands they may have there, for the purpose of opening them up to white settlement. . . . Among the agreements negotiated was that with the Shawnees [sic] and Arapahoes, who are on a large territory under Executive order, having no title whatever *except the title to allotment.*

*Id.* (emphasis added). Representative Mansur noted that the Jerome Commission "has made treaties for the *surplus lands* of the following tribes of Indians in Oklahoma Territory . . . Cheyennes and Arapahoes. . . . " *Id.* at 3723 (emphasis added).[11]

The instructions given to the Jerome Commission (Instructions) also confirm that the Tribe was to retain jurisdiction over the trust allotments.[12] The Instructions show that, notwithstanding the cession of some lands, the Western Oklahoma tribes, including the Cheyenne-Arapaho were to retain some form of land base, whether that be a reservation or allotted lands. The Commission was specifically instructed that:

> . . . It will . . . be necessary in the event of successful [cession] negotiations . . . *to provide new reservations* suitable to the requirements of each band within the reservation now occupied by such band, *or to provide for allotments in severalty within the reservations now so occupied.* . . .

Instructions at 92-93; Vol. III, Aplt. App. at 229-30 (emphasis added). Petitioners ignore these specific

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[11] This Court routinely refers to "surplus" lands as "ceded" or "unallotted" lands. *E.g., DeCoteau*, 420 U.S. at 434, 442.

[12] As Petitioners point out, Pet. at 19, Excerpts from the Instructions to the Jerome Commission from the Commissioner of Indian Affairs can be found beginning at page 199, Volume III of the Appellants' Appendix filed in the Court of Appeals. (Aplt. App.)

instructions. Pet. at 18-19; *see also DeCoteau*, 420 U.S. at 446 ("as the historical circumstances make clear . . . the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs").[13]

In sum, the Court of Appeals here reviewed the 1891 Act for any indication that the Tribe's taxing jurisdiction over the activities on trust allotments has been divested. Based on the Act's plain language, the court properly concluded that it failed to show express intent of Congress to divest the tribal jurisdiction.[14] This

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[13] In addition to the Jerome Commission Instructions, Respondents put in the record in this case the following other historical evidence that the Tribe retained jurisdiction over the trust allotments: (1) The negotiations between the Jerome Commission and the Tribe of July and October, 1890. *See* Aplt. App. Vols. III and IV at 232-358; (2) Correspondence relating to the negotiations. *See* Aplt. App. Vol V. at 415-31; and (3) Correspondence regarding the implementation of the 1891 Act. *See* Aplt. App. Vol. V at 432-54. In addition, Respondents submitted testimony by affidavit of Dr. Donald J. Berthrong, a noted historian on the Cheyenne and Arapaho Tribes of Oklahoma, who concluded that the historical circumstances showed the United States' intent to leave "control and influence" over the allotted lands with the Tribe. *See* Affidavit of Donald J. Berthrong, Aplt. App. Vol V at 482-95. *See also* Testimony by Deposition of Dr. Berthrong, Aplt. App. Vols. V and VI at 496-628.

[14] Assuming *arguendo* that there were any ambiguity on this point of statutory interpretation, this Court has developed canons of construction based on the federal trust responsibility to Indians that favor preservation of Indian rights. *See Cohen* at 221-225. Thus, "[o]nce powers of tribal self-government or other Indian rights are shown to exist, . . . federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights." *Id.*; *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269

conclusion is supported by the 1891 Act's legislative history, the historical circumstances surrounding the Act, and Executive Branch advocacy in this case. *See* Brief of United States as *Amicus Curiae* (10th Cir. filed Nov. 20, 1995). Hence, the Court of Appeals correctly held that the Tribe's jurisdiction at issue here remains intact, and no further review by this Court is necessary.

### B. The Court of Appeals' Decision is Narrowly Tailored to Apply Only to Trust Allotments Within the Original Boundaries of the Tribe's Reservation

The Court of Appeals' decision is properly limited to the facts of this case. The Tribe's government has been continuously recognized by the United States government both before and after the 1891 Act. The allotments created by the 1891 Act indisputably are within the boundaries of the Tribe's original 1869 Reservation. The 1869 Reservation was validly set apart for the Tribe by the Treaty of 1865 and the Executive Order of 1869. The trust allotments are and always have been held in trust by the federal government for the Tribe's members since the 1891 Act. Proclamation No. 23, 27 Stat. 1018, 1019 (1892); *see also* 25 C.F.R. Chap. 1, App. 748-752. Petitioners' sweeping assertions that the decision below has novel and far-reaching implications in that it extends tribal jurisdiction to "all land outside of a reservation" is a specious assertion to which this Court should not fall prey. *See* Pet. at 9, 24, 25. Tribal jurisdiction is not limited to "formal" Indian reservations. *Potawatomi*, 498 U.S. 505. Tribal jurisdiction extends generally to Indian country as

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(1992) (finding that ambiguous provisions of Indian statutes are to be construed liberally and interpreted for the benefit of the Indians).

defined by Congress and construed by this Court. The Court of Appeals here did not address land other than the trust allotments – which according to all branches of the federal government are Indian country. 18 U.S.C. § 1151(c); *Sac and Fox*, 508 U.S. 114; *DeCoteau*, 420 U.S. 425; *Pelican*, 232 U.S. 442; Brief of United States as *Amicus Curiae* (10th Cir. filed Nov. 20, 1995).

## III. THE DECISION OF THE COURT OF APPEALS THAT TRUST ALLOTMENTS CONSTITUTE INDIAN COUNTRY AS DEFINED BY THIS COURT AND CODIFIED BY CONGRESS IN 18 U.S.C. § 1151 DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

### A. The Decision of the Court of Appeals Does Not Conflict With *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima*, 903 F.2d 1207 (9th Cir. 1990), *aff'd*, 502 U.S. 251 (1992), or With Any Other Decision of the Ninth Circuit

In *County of Yakima*, the court of appeals was asked to determine whether Section 6 of the General Allotment Act (GAA), 25 U.S.C. § 349, authorized a county to levy and collect *ad valorem* taxes on land within an Indian reservation owned in fee patent by tribes and tribal members. After examining the statutory language and cases interpreting it, the court of appeals held that the GAA manifested "Congress's 'unmistakably clear' intent to permit states to tax fee patented land." 903 F.2d at 1211.

Following this holding, the court of appeals in *County of Yakima* proceeded to examine whether any act of Congress subsequent to the GAA revoked the states' power of taxation. *Id.* at 1214-15. Upon the tribes' suggestion, the court examined the Indian country statute, 18 U.S.C. § 1151 to determine whether it had such an effect.

The court found that it did not. *Id.* at 1215. Specifically, the court stated:

> The Yakima Nation also argues that 18 U.S.C. § 1151 is authority for precluding taxation. This statute defines 'Indian country' for purposes of criminal jurisdiction as encompassing 'all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent.' 18 U.S.C. § 1151(a). The broad definition of "Indian country" in this statute reflects an attempt by Congress to "remove the uncertainty" as to the limits of federal criminal jurisdiction over Indian territory. . . .
>
> Yet, while we acknowledge that section 1151 governs fee patented land for purposes of criminal jurisdiction, we do not consider section 1151 relevant to the question of whether fee patented land may be taxed by the state. The taxing power is an exercise of the state's civil, rather than its criminal, authority, and is governed by a noncriminal federal statutory scheme of which 25 U.S.C. § 349 is a part. . . . We conclude that 18 U.S.C. § 1151 does not disallow Yakima County's taxing power under 25 U.S.C. § 349.

*Id.*

Examining this discussion of Section 1151 within the context of the *County of Yakima* case, it is clear that the decision there in no way conflicts with the decision of the Court of Appeals here. In *County of Yakima*, the court of appeals construed Section 1151 essentially to determine whether it restored or "created" tribal immunity from state taxation on fee patented lands where that immunity had been explicitly divested by Congress. Here, however, the Court of Appeals found that the Tribe was never divested of its inherent jurisdiction over the trust allotments in question. Therefore, the Court of Appeals did not need to consider and did not in fact consider whether

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Section 1151 "creates" the Tribe's civil jurisdiction over such lands. Contrary to Petitioners' assertion, Pet. at 11-12, there is thus no conflict with *County of Yakima* on this point.[15]

Moreover, to the extent that the Court of Appeals here relied on Section 1151 as authority in support of tribal civil jurisdiction, the court was absolutely correct for several reasons. Congress has itself used the definition contained in the Indian country statute, 18 U.S.C. § 1151, in a civil context. For instance, the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, which is a civil statute, expressly refers to and adopts Section 1151's definition of Indian country. 25 U.S.C. § 1903(10). Also, this Court has held that Section 1151 applies to questions of civil jurisdiction. In *DeCoteau*, a case which involved questions of both criminal and civil jurisdiction, the Court held:

> [w]hile section 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.

420 U.S. at 427 n.2. In *California v. Cabazon Band of Mission Indians*, a regulatory case, the Court reiterated that:

> 'Indian country,' as defined at 18 U.S.C. § 1151 . . . applies to questions of both criminal and civil jurisdiction.

480 U.S. 202, 207 n.5. (1987). Furthermore, this Court has recently applied Section 1151 in purely civil settings. *E.g.*,

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[15] Because the Court of Appeals in this case did not decide whether Section 1151 could create or furnish civil jurisdiction, Petitioners' reliance, Pet. at 11, on a statement in *Pittsburg & Midway Coal Mining Company v. Watchman*, that "§ 1151 represents an express Congressional delegation of civil authority over Indian country to the tribes," 52 F.3d 1531, 1541 (10th Cir. 1995), is misplaced.

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*Chickasaw Nation*, 115 S.Ct at 2217 n.2; *Sac and Fox*, 508 U.S. at 123. Thus, to the extent that the court of appeals in *County of Yakima* misconstrued this Court's holdings, that is not a basis for review of the decision below in this case wherein the Court of Appeals correctly followed the Court's holdings.

Finally, Petitioners' argument of an alleged conflict with the Ninth Circuit has recently been eviscerated by the recent holding of that circuit in *Alaska v. Native Village of Venetie Tribal Government*, 1996 W.L. 668441 (9th Cir. Alaska). In *Venetie*, the issue was whether a tribe could tax the activities of a non-Indian entity doing business within the tribe's territory. The court stated:

> The ultimate question presented by this case – whether Venetie has the authority to tax activities occurring within its territory – turns on whether Venetie occupies Indian country. . . . To resolve this question, we must first establish the proper standard for determining whether Indian country exists in a given case. Congress has defined Indian country as follows . . . 18 U.S.C. § 1151. This definition applies to both criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987).

*Venetie* at *3. The decision of the court of appeals in *Venetie* is quite aligned with the decision here.[16]

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[16] Other Circuits have likewise followed this Court's rulings with respect to Section 1151. In *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996) the First Circuit followed *Cabazon* and *DeCoteau* to find that "the definition provided in section 1151 'applies to questions of both criminal and civil jurisdiction.' " 89 F.3d at 915. The court went on to cite *Chickasaw* and *Sac and Fox* for the proposition that "elsewhere, the Court has simply defined 'Indian country' in

### B. The Decision of the Court of Appeals does not conflict with *General Motors Acceptance Corp. v. Chischilly*, 628 P.2d 683 (N.M. 1981)

Because this Court has settled the question of Section 1151's applicability to civil settings, *Chischilly* also fails to support Petitioners' conflict argument. In *Chischilly*, the New Mexico Supreme Court discussed whether a tribe's civil jurisdiction extended beyond the boundaries of the tribe's formal reservation to other land held in trust for the tribe. 628 P.2d at 684. Responding to an argument that Section 1151 provided authority for such an extension of jurisdiction, the court decided that Section 1151 applied only to instances of criminal jurisdiction. 628 P.2d at 685. The court noted that "while [the footnote in *DeCoteau v. District County Court*] may be read to support [the theory that § 1151 applies to civil jurisdiction], it is ambiguous and the cases cited in support of the statements in the footnote do not refer to any civil application of 18 U.S.C. § 1151." *Id.*

Since this statement was made, however, any ambiguity regarding the *DeCoteau* footnote has been resolved. *See California v. Cabazon Band of Mission Indians*, 480 U.S. at 207 n.5 (stating explicitly that the definition contained in § 1151 "applies to questions of both criminal and civil jurisdiction"). Furthermore, since *Chischilly* was decided, this Court has itself twice applied Section 1151 to purely civil settings. *Chickasaw Nation*, 115 S.Ct. at 2217 (taxing jurisdiction); *Sac and Fox*, 508 U.S. at 123 (same). Thus, to the extent the court in *Chischilly* misunderstood this Court's cases, that is not a basis for reviewing a correct

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civil cases in terms closely parallelling those of section 1151, while citing to that statute." *Id. See also Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540 n.10 (10th Cir. 1995).

understanding of the cases exhibited by the Court of Appeals here.

### C. The Decision of the Court of Appeals does not conflict with any decision of this Court

Petitioners assert that the decision of the Court of Appeals is inconsistent with *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206 (1943). Pet. at 17, 21-23. Petitioners first argue that *Oklahoma Gas & Elec.* recognized a distinction between "disestablished" and "diminished" reservations. *Id.* Based on this premise, they go on to argue that because the reservation here was "disestablished" and not "diminished," the Tribe lost jurisdiction over the trust allotments of tribal members. *Id.* at 20. However, for two reasons Petitioners' arguments lack merit.

First, this Court uses the terms "diminished" and "disestablished" interchangeably. *E.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *see also Solem v. Bartlett*, 465 U.S. at 475 n.17 ("diminished" . . . [is] a term of art in Indian law"). *Oklahoma Gas & Elec.* does not create any new distinction between the terms. Rather, that case merely determined whether certain Indian allotments constituted a "reservation" within the specific meaning of two rights-of-way statutes, the Acts of February 15, 1901, 43 U.S.C. § 959, and March 4, 1911, 36 Stat. 1235, 1253 (current version at 43 U.S.C. § 9261). But neither *Oklahoma Gas & Elec.* nor the Opinion of the United States Department of the Interior cited by Petitioners, Pet. at 23, which relies largely on the *Oklahoma Gas & Elec.* decision, reached the issue in this case of whether trust allotments are nevertheless "Indian country" and subject to tribal jurisdiction. There is thus no conflict with this case

wherein the question of whether the trust allotments are a "reservation" is a non-issue. *See supra*, n.6.[17]

Second, as the Court of Appeals properly held, the issue of disestablishment is irrelevant to this case. Specifically, the court stated, "disestablishment of the reservation is not dispositive of the question of tribal jurisdiction." Pet. App. at 6. This holding follows directly from cases like *Sac and Fox*, where this Court disregarded a state's contentions that disestablishment was relevant to questions of jurisdiction over parcels of tribal trust land and trust allotments. 508 U.S. at 123; *accord Potawatomi*, 505 U.S. at 511. It also follows directly from *DeCoteau*. Like the Tribe here, the Tribes involved in *DeCoteau* had ceded all their unallotted lands.[18] Although the

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[17] Petitioners also argue, Pet. at 22-23, that the Court in *Oklahoma Gas & Elec.* distinguished the Kickapoo trust allotments in that case from those in cases such as *United States v. Pelican*, on the basis that the Kickapoo reservation had been "dissolved." This point does not resolve this case and underscores Petitioners' failure to address the issue in this case.

The Court in *Oklahoma Gas & Elec.* apparently viewed *Pelican* as holding that the trust allotment there was a "reservation." To the extent it did, that is an incorrect reading of *Pelican*. *Pelican* held that the allotment involved in that case was "Indian country" within the meaning of a specific federal criminal statute. 232 U.S. at 444-449.

Moreover, the issue here is not, as it was in *Oklahoma Gas & Elec.*, whether the trust allotments are a reservation. Nor is the issue whether the Tribe's reservation has been disestablished or "dissolved." The issue is simply whether the Tribe can tax activities on trust allotments. *Pelican* supports the conclusion that it can and *Oklahoma Gas & Electric* is consistent with that conclusion.

[18] Footnote 22 in *DeCoteau* may obscure the similarity between the Sisseton-Wahpeton Agreement at issue in *DeCoteau* and the Tribe's Agreement here. However, close analysis of the

disestablishment or "termination" of the Tribes' reservation in *DeCoteau* did affect the Tribes' jurisdiction on the "non-Indian, unallotted land within the . . . Reservation borders," *id.* at 428, it did not affect tribal jurisdiction on the "Indian allotments, the Indian titles to which have not been extinguished." *Id.* at 427 n.2, 428; *see also Solem v. Bartlett*, 465 U.S. at 467 n.8 ("[r]egardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments").

## CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Agreements reveals that both tribes retained only allotments to tribal members. Hence, Petitioners' attempt to distinguish the Agreements, Pet. at 15-16, is flawed. Similarly flawed is Petitioners' point, Pet. at 21, 26-27, that allotments were made to individual tribal members, not tribes, when this Court in *DeCoteau* recognized that allotments can "provide an adequate fulcrum for tribal affairs." 420 U.S. at 446; *see also Sac and Fox*, 508 U.S. 114.